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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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12 IN RE: MIDLAND CREDIT
13 MANAGEMENT, INC.,
14 TELEPHONIC CONSUMER
15 PROTECTION ACT LITIGATION

Case No.: 11-md-2286-MMA-MDD

**ORDER SETTING DISCOVERY
DEADLINES AND LIMITATIONS
ON DISCOVERY**

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17 On June 4, 2019, the Court ordered the parties to meet and confer and
18 submit to the Court a joint status report providing the following information:

19 1. Whether the discovery contemplated by the questionnaire process is
20 complete;

21 2. A joint discovery plan regarding depositions of Defendants under
22 Rule 30(b)(6) and of individual Plaintiffs, including the class
23 representative(s); and,

24 3. A proposed scheduling order containing a deadline for completing this
25 round of discovery, a deadline for filing summary judgment motions and a
26 deadline for filing any motion for class certification. (ECF No. 689).

27 Three status reports were filed on August 5, 2019. Defendants and

1 Lead Plaintiff filed a joint status report. (ECF No. 695). Individual Plaintiff
2 Nicholas Martin filed a status report through his counsel. (ECF No. 696).
3 Counsel who represent, collectively, fourteen individual Plaintiffs, filed a
4 joint status report on behalf of these Plaintiffs. (ECF No. 697). Defendants
5 did not participate in the status reports filed on behalf of any individual
6 Plaintiffs.

7 PLAINTIFF QUESTIONNAIRE AND RELATED DISCOVERY

8 There has been some significant discovery in this case. On September
9 5, 2018, the Court ordered every plaintiff in every member case of this multi-
10 district litigation to complete a questionnaire and serve it upon Defendants.
11 (ECF No. 608). The questionnaire was negotiated between the Lead Plaintiff
12 and Defendants. Once completed, it was made available by the Court to all
13 for objections. The questionnaire consisted of three pages of questions and a
14 request for supporting documents. (ECF No. 608-1). Plaintiffs who
15 completed the questionnaire and agreed to comply with a protective order,
16 received reciprocal discovery from Defendants. (ECF No. 608-2).

17 In response to properly completed questionnaires and
18 acknowledgements of the protective order, Defendants were obliged to
19 provide to each Plaintiff a list of calls made to the Plaintiff on the accounts
20 identified in the questionnaire to cellular telephone numbers identified in the
21 questionnaire; any account notes or other records relating to the identified
22 account(s); and any evidence regarding consent possessed by Defendants.
23 (ECF No. 608 at 4-5). Defendants also were required to provide detailed
24 discovery of its relevant dialing technologies and processes. (ECF No. 608 at
25 5-6).

26 According to Defendants and Lead Plaintiff, this process is complete.
27

1 THE PARTIES' POSITIONS AND PROPOSALS

2 Plaintiff Nicholas Martin asserts that the information provided by
3 Defendants is insufficient for plaintiffs that opted out of the initial class
4 action and complain of calls prior to September 1, 2014. Counsel for Mr.
5 Martin suggests that the Court appoint liaison counsel for the opt-out cases
6 and provides suggested written discovery requests. Counsel for the fourteen
7 individual Plaintiffs assert that they may not have received complete records.
8 Specifically, they report that Defendants responded that there are no call
9 records for two Plaintiffs, Denise Boyd and Jane Morley, a point disputed by
10 those Plaintiffs. The fourteen Plaintiffs request that the Court authorize
11 third-party discovery of Plaintiffs' cell carriers and of certain former
12 employees of Defendants.

13 Lead Plaintiff proposes that the Court authorize additional and "follow-
14 up" non-duplicative written discovery to Defendants regarding the calling
15 technology at issue in this action. Defendants take the unhelpful posture
16 that they cannot take a position without seeing the actual requests.
17 Defendants also state that if written discovery is authorized for Lead
18 Plaintiff, Defendants also should be able to conduct written discovery.
19 Regarding depositions, Lead Plaintiff and Defendants agree that Defendants
20 may take the deposition of Lead Plaintiff and other Plaintiffs alleging calls
21 after September 1, 2014. The parties agree that after these depositions are
22 completed, Defendants' corporate representative should be deposed under
23 Rule 30(b)(6), Fed. R. Civ. P., regarding Defendants' calling practices and
24 technologies during the proposed class period. The parties propose deadlines
25 for written discovery, if authorized by the Court, deadlines for Plaintiff
26 depositions and for the deposition of Defendants' representative. Deadlines
27 also are offered for Lead Plaintiff to file a motion for class certification and

1 for summary judgment.

2 ANALYSIS

3 This is a complex proceeding. In this multi-district litigation, there has
4 been one class action, which has been settled, regarding calls made up to
5 September 1, 2014. A second proposed class action commencing on that date
6 is underway and is the subject, in part, of this Order. There are plaintiffs
7 who opted-out of the initial class action settlement and there are plaintiffs
8 who ultimately may opt-out of any settlement of the pending proposed class.
9 Some plaintiffs that allege calls and opted out of the initial settlement also
10 allege calls during the new proposed class period. There is no one-size-fits-all
11 solution here.

12 Regarding cases involving calls on or after September 1, 2014, the Court
13 is not convinced of the need for additional written discovery regarding the
14 calling technologies used and disclosed by Defendants in the questionnaire
15 process. The Court believes that a properly prepared corporate
16 representative can answer any questions raised in a deposition under Rule
17 30(b)(6). The Court understands the need for the deposition of the Lead
18 Plaintiff to help to determine his suitability as the class representative. The
19 Court is not convinced that depositions of other Plaintiffs alleging calls post-
20 September 1, 2014, is warranted at this time. The parties prefer first to
21 proceed with the Lead Plaintiff's deposition. The Court will accept that
22 agreement. The deposition of Lead Plaintiff must occur in Wisconsin no later
23 than October 25, 2019.

24 The parties propose that the deposition of Defendants' representative
25 on calling technologies and calling practices on and after September 1, 2014,
26 take place no later than February 7, 2020. The Court sees no reason for the
27 extended delay for that deposition. Accordingly, this corporate deposition

1 must be completed no later than November 22, 2019. The Court agrees that
2 there may be some value in coordinating the deposition of Defendants'
3 representative in connection with two other purported class actions regarding
4 the same allegations and the same time period pending before other judges of
5 this Court. That should be worked between all counsel.

6 Lead Plaintiff suggests that the motion for class certification be filed no
7 more than 45 days after completing the deposition of Defendants'
8 representative. The Court agrees but will add in some time due to holidays.
9 Any motion for class certification must be filed no later than January 24,
10 2020.

11 The parties are in dispute regarding the timing of any summary
12 judgment motion to be filed by Defendants. Plaintiff wants to wait for the
13 result of the class certification motion. Defendants would like to bring the
14 summary judgment motion earlier. The Court finds that Defendants can
15 bring their summary judgment motion on the same schedule as Plaintiff's
16 motion for class certification.

17 Regarding the deposition of Defendants' representative on calling
18 technologies and practices used on and after September 1, 2014, the Court
19 believes that the interests of Lead Plaintiff and the other plaintiffs alleging
20 calls on and after September 1, 2014, are aligned sufficiently for counsel for
21 Lead Plaintiff to conduct the corporate deposition. The Court suggests,
22 however, that technology be employed in the deposition of Defendants'
23 representative so that the deposition may be accessible in real-time, at least
24 by audio, by other Plaintiffs who may electronically propose follow-up
25 questions to the deposing attorney.

26 The 14 individual Plaintiffs that filed a status report seek additional
27 discovery. (ECF No. 697). Most of these plaintiffs appear to be prospective

1 class members as they allege calls after September 1, 2014. Some allege calls
2 both before and after September 1, 2014. A few appear only to allege calls
3 prior to September 1, 2014. These 14 Plaintiffs, through their counsel, seek
4 permission to issue subpoenas to their cellular service providers to obtain
5 evidence of their calls. The Court approves this request. They also seek to
6 depose “certain third-party fact witnesses,” including a former employee of
7 Defendants, “believed to have crucial information about internal policies
8 directly relevant to defendant’s compliance . . . with the [TCPA].” The Court
9 will order counsel for Lead Plaintiff to confer with counsel representing the
10 14 Plaintiffs and, if these witnesses are prepared to give relevant testimony
11 regarding calling practices during the proposed class period, meet and confer
12 with Defendants and file a joint motion for permission to take these
13 depositions reflecting the view of the plaintiffs and Defendants. If there is no
14 agreement presented in the joint motion, the Court expects the proponent to
15 provide a detailed statement regarding the testimony these third-parties
16 would be expected to provide. Any such joint motion must be filed no later
17 than December 2, 2019.

18 Plaintiff Martin filed a status report expressing his frustration as a
19 Plaintiff who opted out of the settlement of the initial class action. Mr.
20 Martin requests the Court appoint liaison counsel and wants the Court to
21 allow for direct discovery. (ECF No. 696). The Court had appointed liaison
22 counsel and later approved the withdrawal of that counsel due to conflict.
23 (ECF No. 548). The Court solicited applications from the community of
24 counsel for the individual plaintiffs to take on the role. No applications were
25 received. The Court cannot authorize independent discovery in each case
26 alleging calls prior to September 1, 2014. This would contravene the purpose
27 of the MDL.

1 The Court recognizes that it did not provide a procedure for plaintiffs
2 with concerns regarding the plaintiff-specific discovery provided by
3 Defendants in the questionnaire process to bring the concerns to the
4 attention of the Court. This issue was raised by the 14 Plaintiffs in their
5 status report and also raised recently by Plaintiff Ashok Arora. (ECF No.
6 701). This also needs to be addressed in this phase of discovery. No later
7 than September 30, 2019, Defendants must file a report:

- 8 1. Including a list of the member cases and counsel alleging calls prior
9 to September 1, 2014;
- 10 2. Designating attorneys responsible for responding to individual
11 Plaintiffs, if unrepresented, or their counsel, to discuss discovery
12 issues and settlement. To the extent a plaintiff wishes to depose
13 Defendants, under Rule 30(b)(6), regarding calling technologies and
14 practices during relevant time periods, other than post-September 1,
15 2014, the Court expects the involved parties to confer and propose a
16 suitable procedure protecting the interests of the pre-September 1,
17 2014 plaintiffs. A joint motion regarding a deposition of Defendants
18 for this purpose must be filed no later than December 2, 2019.
- 19 3. Designating attorneys responsible for responding to individual
20 Plaintiffs, if unrepresented, or their counsel, regarding issues with
21 the plaintiff-specific discovery provided by Defendants during the
22 questionnaire process. Plaintiffs who remain dissatisfied with
23 Defendants production may initiate a joint motion for determination
24 of discovery dispute as provided in the Court's Civil Chambers Rules.
25 The 30-day clock for bringing such a motion to the Court will
26 commence on December 2, 2019.

CONCLUSION AND ORDER

The following discovery is authorized, and the following deadlines apply in this next phase of this case:

1. Defendants may depose the Lead Plaintiff in Wisconsin no later than October 25, 2019.
2. Lead Plaintiff may depose Defendants by means of Rule 30(b)(6), Fed. R. Civ. P., regarding calling technologies and calling practices beginning on September 1, 2014, through the purported class period, no later than November 22, 2019.
3. Individual Plaintiffs are authorized to serve third-party subpoenas, under Rule 45, Fed. R. Civ. P., to cellular carriers who may possess relevant calling records relating to each Plaintiff.
4. No later than October 25, 2019, counsel for individual Plaintiffs alleging calls on or after September 1, 2014 must contact counsel for Lead Plaintiff regarding additional depositions suitable for handling under the MDL. Counsel for Lead Plaintiff must confer with counsel representing the 14 Plaintiffs and, if the proposed witnesses are prepared to give relevant testimony regarding calling practices during the purported new class period, meet and confer with Defendants and file a joint motion for permission to take these depositions reflecting the view of the plaintiffs and Defendants. The motion must be filed no later than December 2, 2019.
5. No later than September 30, 2019, Defendants must file a report:
 - a. Including a list of the member cases and counsel alleging calls prior to September 1, 2014;
 - b. Designating attorneys responsible for responding to individual Plaintiffs, if unrepresented, or their counsel, to discuss

1 discovery issues unique to the pre-September 1, 2014 cases, and
2 to discuss settlement. To the extent a plaintiff wishes to depose
3 Defendants, under Rule 30(b)(6), regarding calling technologies
4 and practices during relevant time periods preceding
5 September 1, 2014, the Court expects the involved parties to
6 confer and propose a suitable procedure protecting the interests
7 of the pre-September 1, 2014 plaintiffs. A joint motion
8 regarding a deposition of Defendants for this purpose must be
9 filed no later than December 2, 2019.

10 c. Designating attorneys responsible for responding to individual
11 Plaintiffs, if unrepresented, or their counsel, regarding issues
12 with the plaintiff-specific discovery provided by Defendants
13 during the questionnaire process. Plaintiffs who remain
14 dissatisfied with Defendants production, after conferring with
15 Defendants, may initiate a joint motion for determination of
16 discovery dispute as provided in the Court's Civil Chambers
17 Rules. The 30-day clock for bringing such a motion to the Court
18 will commence on December 2, 2019.

19 6. Any motion for class certification and any motion for summary
20 judgment must be filed no later than January 24, 2020.

21 **IT IS SO ORDERED:**

22 Dated: September 4, 2019

23 
24 Hon. Mitchell D. Dembin
25 United States Magistrate Judge
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